



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 325 OF 2017**

**JOEL MUNGAI KIMANI.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WARIARA.....2<sup>ND</sup> PLAINTIFF**

**PATRICK NJOROGE.....3<sup>RD</sup> PLAINTIFF**

**(Suing as the lawful administrators of the estate of**

**MARGARET WAMBUI NJOROGE)**

**VERSUS**

**HENRY MACHARIA KARIUKI.....1<sup>ST</sup> DEFENDANT**

**UNILANDS SACCO.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, NAKURU.....3<sup>RD</sup> DEFENDANT**

**CONSOLIDATED WITH**

**ELC NO. 289 OF 2017**

**HENRY MACHARIA KARIUKI.....PLAINTIFF**

**VERSUS**

**PATRICK NJUGUNA KIARIE.....1<sup>ST</sup> DEFENDANT**

**PATRICK NJOROGE KIMANI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Proceedings herein concern two consolidated suits: ELC 289 of 2017 (Nakuru) and ELC 325 of 2017 (Nakuru). The first case to be filed was ELC 289 of 2017 which was filed on 12<sup>th</sup> July 2017. Henry Macharia Kariuki (hereafter “Henry”) filed the case against Patrick Njuguna Kiarie (hereafter “Kiarie”) and Patrick Njoroge Kimani (hereafter “Kimani”). Henry averred that he is the registered owner of a parcel of land known as Dundori/Lanet Block 5/145 (Kiambogo ‘A’), the suit property, and that Kiarie and Kimani had trespassed onto the suit property.

2. Together with the plaint, Henry filed Notice of Motion dated 8<sup>th</sup> July 2017 in which he sought the following orders:

**1. Spent.**

**2. Spent.**

**3. That pending the hearing and final determination of this suit, this honourable court be pleased to issue an injunction**

*restraining the defendants either by themselves, their agents, servants and/or any other person acting on their behalf from trespassing and putting up structures and/or interfering in any way whatsoever with all that parcel of land known as Dundori/Lanet Block 5/145 (Kiamunyeki).*

*4. That this honourable court be pleased to issue an eviction against the defendants/respondents.*

*5. That the costs of this application be borne by the respondents.*

The application was supported by an affidavit sworn by Henry.

3. Hardly 3 weeks later, ELC 325 of 2017 was filed by Joel Mungai Kimani, Elizabeth Wariaga and Patrick Njoroge (hereinafter the administrators) all suing as administrators of the estate of Margaret Wambui Njoroge (deceased). They named the defendants in the case as Henry, Unilands Sacco and District Land Registrar Nakuru. Alongside the plaint, they filed Notice of Motion dated 3<sup>rd</sup> August 2017 in which they sought the following orders:

*1. Spent.*

*2. Spent.*

*3. That this honourable court be pleased to restrain the respondents from entering into, ploughing, farming, selling, leasing, mortgaging, charging, alienating and/or in any other way they may be construed in whatsoever pending the hearing and determination of this suit.*

*4. That this honourable court be pleased to issue an order of inhibition during the pendency of this application as well as for final hearing and determination of this suit.*

*5. That this honourable court be pleased to issue an order for the production of the original register currently being held by the 2<sup>nd</sup> defendant herein and green card to help in the just and expedient disposal of the matter herein.*

*6. That costs of this application be provided for.*

The application was supported by an affidavit sworn by Kimani.

4. Both suits were consolidated and ELC 325 of 2017 was chosen as the lead file. Both applications were heard together by way of written submissions. Henry filed his submissions on 25<sup>th</sup> May 2018, the administrators filed their submissions on 20<sup>th</sup> June 2018, Kiarie and Kimani filed their submissions on 20<sup>th</sup> June 2018 while Unilands Sacco filed its submissions on 26<sup>th</sup> September 2018. I have considered the application, the affidavits filed and the submissions.

5. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

6. Both the administrators and Henry claim the suit property. The administrators contend that the suit property belonged to the deceased and that they hold a Certificate of Confirmation of Grant in respect of the estate of the deceased. In that regard, they annexed a copy of a title deed which shows that the deceased was registered as proprietor of the suit property on 25<sup>th</sup> June 2007. They also annexed a copy of Certificate of Confirmation of Grant issued to them on 1<sup>st</sup> February 2016 in HC Succession Cause No. 48 of 2010 (Nakuru). I note that the suit property was devolved to Kimani in the distribution done by the High Court.

7. I further note that Henry's position is that he owns the suit property pursuant to a Title Deed which shows that he became registered proprietor on 6<sup>th</sup> January 2016. In an affidavit sworn by Mwangi Githinji and filed on 28<sup>th</sup> September 2017 by Unilands Sacco, Unilands Sacco claims that it bought the suit property from Henry pursuant to a sale agreement dated 12<sup>th</sup> March 2017. Although Henry filed his suit after the date of the alleged sale to Unilands, Henry did not mention such a sale.

8. There is great contestation regarding ownership of the suit property. That is a matter that can only be resolved upon the trial of the suit. Equally, there is much contestation regarding who is in occupation of the suit property. Although Henry claims to be in occupation, he has not stated the date when his occupation started. The administrators' version is that the deceased took possession on a date which they have not stated. They further alleged that unknown people came to the land and demolished a house on a date which they have not stated.

9. In the circumstances, I do not think it would be prudent to grant any of the parties an injunction against the other as they have sought. Instead, it is important to preserve the suit property generally to await hearing and determination of the consolidated suits. Such an approach is in line with paragraph 32 of **Gazette Notice No. 5178** titled "**Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**" which encourages preservation of the suit property. It provides:

***During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.***

10. I note that prayer 4 of Notice of Motion dated 8<sup>th</sup> July 2017 is the same as prayer (b) in the plaint in ELC 289 of 2017. It seeks a final order that must await determination at the hearing of the suit. Further prayer 5 of Notice of Motion dated 3<sup>rd</sup> August 2017 relates to matters of discovery. There is a clear procedure available to deal with such issues. I see no reason to grant such orders at this stage.

11. In the end, I make the following orders:

- a) An inhibition be registered against the parcel of land known as Dundori/Lanet Block 5/145 (Kiamunyeki 'A') pending hearing and determination of the consolidated suits.
- b) Pending hearing and determination of the consolidated suits, all the parties to the consolidated suits are hereby restrained through themselves, their agents, servants, representatives or any other person acting on their behalf from selling, alienating, mortgaging, subdividing, constructing upon or in any manner damaging the parcel of land known as Dundori/Lanet Block 5/145 (Kiamunyeki 'A').
- c) Costs of Notice of Motion dated 8<sup>th</sup> July 2017 and Notice of Motion dated 3<sup>rd</sup> August 2017 shall be in the cause.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 4<sup>th</sup> day of December 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mutai for the plaintiffs/applicants

No appearance for the 1<sup>st</sup> defendant/respondent

Ms Wachira holding brief for Mr Murunga for the 2<sup>nd</sup> defendant/respondent

No appearance for the 3<sup>rd</sup> defendant

Court Assistants: Gichaba & Lotkomoi